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CHARLES ELMORE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE INC.,

Appellant.

On Appeal from the Supreme Court of Louisiana.

ORIGINAL BRIEF ON BEHALF OF THE CITY OF NEW ORLEANS, APPELLEE.

BERTRAND I. CAHN,
City Attorney;

WM. F. CONKERTON,
Assistant City Attorney;

FRANCIS P. BURNS,
Assistant City Attorney.

MONTGOMERY-ADL. WEE PRINTING CO. INC., 420-424 CHARTRES, N.O.

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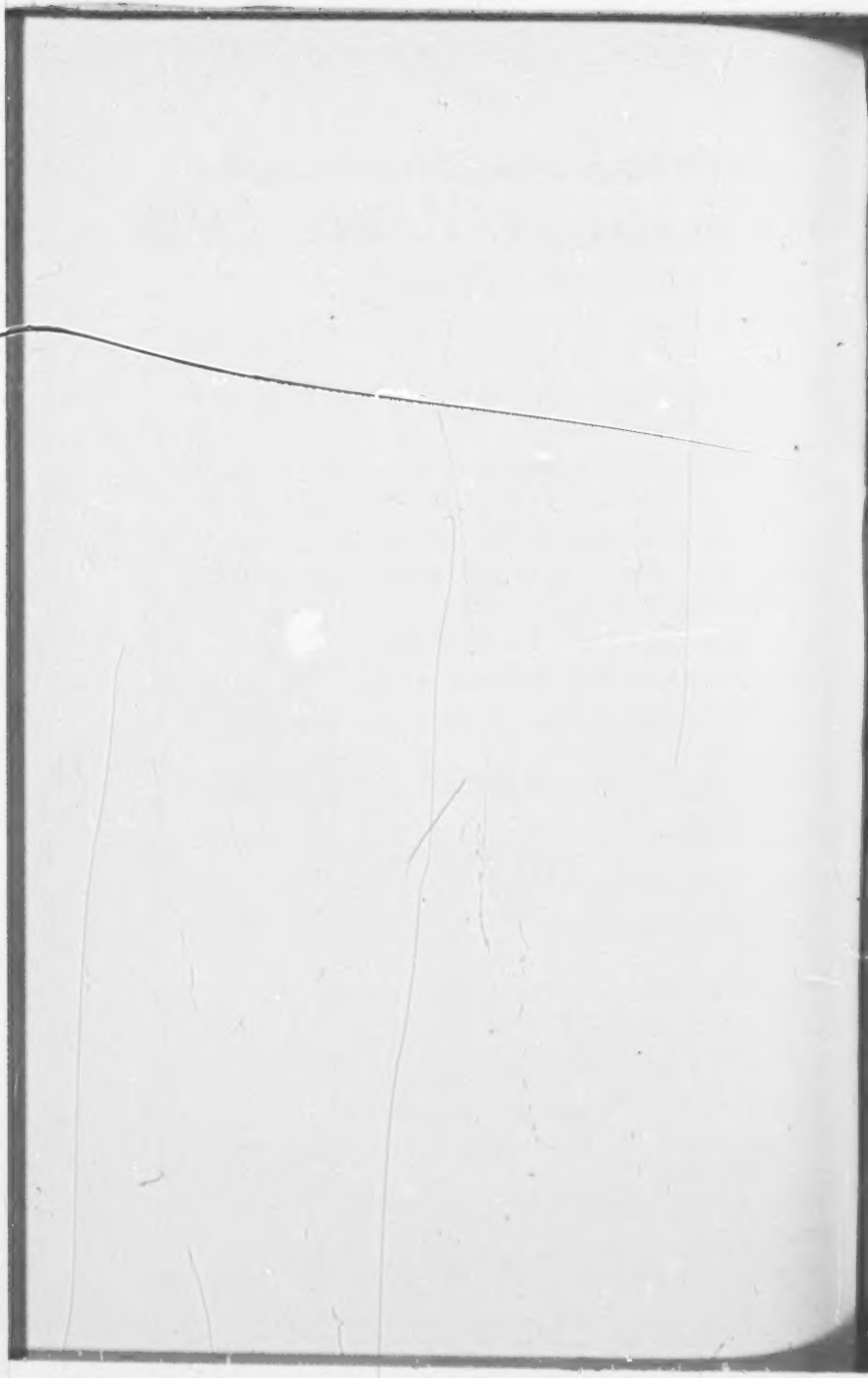

IN THE

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No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE INC.,

Appellant.

On Appeal from the Supreme Court of Louisiana.

ORIGINAL BRIEF ON BEHALF OF THE CITY OF NEW ORLEANS, APPELLEE.

(I)

NATURE OF THE CASE.

In the year 1910, the Council of the City of New Orleans passed Ordinance No. 6445, New Council Series, permitting the New Orleans Railway & Light Co., the predecessor of the N. O. Public Service Inc., appellant

herein, to construct a viaduct **"approximately on the center line of Franklin Avenue,** at, and in the vicinity of the Florida Walk intersection," the said viaduct by the terms of said ordinance **"to embrace earthen embankment approaches of such height and width as"** would **"not exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways of said avenue."**

At the time of the passage and adoption of this ordinance, Franklin Avenue was not open, the streets were not paved and that section of the City of New Orleans served by the street car line traversing the said viaduct was very sparsely inhabited. Since that time (practically 19 years ago) that particular area or portion of the City of New Orleans has rapidly developed and has now become one of the thickly populated sections of the City. **Franklin Avenue has been opened and paved** and now carries a very heavy part of the travel and traffic of that section of the City, particularly the automobile traffic.

The New Orleans Public Service Inc., by Special Master's Deed, dated September 27th, 1922, in the matter *New York Trust Company v. New Orleans Railway & Light Co., No. 16,953, in Equity* (Consolidated Cause), in the United States District Court for the Eastern District of Louisiana, acquired the franchise granted to the New Orleans Railway & Light Co., under Ordinance No. 6032, New Council Series, which was an ordinance permitting the extension of the line which traverses and uses the viaduct herein referred to.

The Commission Council of the City of New Orleans, on November 17th, 1926, passed Ordinance No. 9375,

Commission Council Series (Record, p. 9), which required the New Orleans Public Service Inc. to remove the said viaduct and to complete the removal thereof within one year from the date of the passage of the Ordinance.

The New Orleans Public Service Inc., having failed to comply with the terms and provisions of said ordinance, the Commission Council of the City of New Orleans adopted a motion authorizing and directing the Mayor of the City of New Orleans to institute and prosecute a suit requiring the removal of the said viaduct in compliance with the provisions of Ordinance No. 9375, Commission Council Series.

(II)

THE PETITION OF APPELLEE.

The chief grounds relied upon by the City of New Orleans for the removal and demolition of the viaduct, as presented by its petition (Record, pp. 1-8), are the following:

1st: That it was not constructed in accordance with the ordinance authorizing its construction.

2nd: That as constructed it permits of the laying of but one railroad track on it, which is insufficient for the present needs of the people in that part of the city, served by the railway line crossing it.

3rd: That by reason of decay and the failure to keep it in proper repair, the viaduct has become dangerous and unsafe.

(III)

THE ANSWER OF APPELLANT.

The defense of the appellant, as shown by its answer (Record, pp. 10-17), is in effect a denial of the allegations of the petition, and the further plea that to require the demolition of the viaduct would be to deprive it of its property without due process of law, in violation of the Federal and State Constitutions; and, further, that such action would be an impairment of its contract rights; and, finally, that there is a denial to it of the equal protection of the laws, in contravention to the 14th Amendment of the Constitution of the United States.

(IV)

THE DECREE OF THE SUPREME COURT OF THE STATE OF LOUISIANA.

The decree of the Supreme Court of the State of Louisiana (Record, pp. 161-166) affirming the judgment of the Civil District Court requiring the removal and demolition of the viaduct, is based upon the following grounds:

1st: That the City had the right under its charter Sub. Sec. 3 of Sec. 4 of Act 159 of 1912; Sub. Sec. 12 of Sec. 1 of Act 93 of 1921, to open and keep open and free from obstruction its streets, and to authorize the use of them for railroads operated by horse, electricity, steam or other motive power, and to regulate the same.

2nd: That the City had ample police power for the discharge of its functions, "including the power to enact and enforce all ordinances necessary **for the protection of the lives and property for the preservation of the health, and for the promotion of the comfort, convenience and general welfare of its inhabitants,** and including, specifically, the power to regulate the use of the streets and to maintain them in a safe condition".

3rd: That the viaduct, due to decay, is not in a condition, notwithstanding the repairs made, that should be regarded as safe.

4th: That the city had power, under the facts of the case, to cause the demolition of the viaduct; and that same was not an unreasonable exercise of the police power vested in it.

5th: That the City is not depriving defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, nor of Section 2 of Article 1 of the Constitution of the State of Louisiana, nor was the city impairing the obligation of defendant's contract with it, in violation of the Constitution of the State of Louisiana and of the United States, for by ordering the removal the City was legitimately exercising its police power, subject to which defendant holds its franchise.

(V)

ARGUMENT.

(A)

THE JURISDICTION OF THIS COURT.

[1] Laws and regulations enacted in the interest of public health, safety and convenience of the inhabitants of a community are questions that are purely local in their nature and should be decided by the lawmaking body and the Courts of each State; and it has been held that such laws and regulations are within the exercise of the police power and the decision of the Highest Court of the State as to whether or not the enactment of such laws violates the Federal Constitution is binding on this Court.

> "The protection of the health and morals, as well as lives, of citizens, is within the police power of the state legislature."
>
> *Holden v. Hardin, 169 U. S. 366, 42 L. Ed. 780.*

> "The decision of the highest court of a state that a municipal ordinance which is asserted violates the Federal Constitution, is within the city's charter powers, and is not forbidden, is conclusive on writ of error to the state court."
>
> *Hadacheck v. Sebastian, 239 U. S. 394, 60 L. Ed. 348.*

> "Whether certain municipal ordinances challenged as violating the Federal Constitution are within the power conferred by the legislature upon the municipal corporation is a question of state law,

the decision of which by the highest court is conclusive upon the Federal Supreme Court on writ of error to the state court."

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721.

The 14th Amendment does not take away from the states those powers of police that were reserved at the time the original Constitution was adopted *(Mugler v. Kansas, 123 U. S. 623)*, it does not limit the subjects upon which the police power of a State may be lawfully exerted *(Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. Rep. 282)*, and it was not designed to interfere with the legitimate exercise of the police powers of the states to protect the lives, liberty and property of their citizens and to promote their health, peace, morals, education and good order. *(In Re Kemmler, 136 U. S. 449; Walker v. Pennsylvania, 127 U. S. 699; Powell v. Pennsylvania, 127 U. S. 678; In Re Converse, 137 U. S. 631).*

"In determining whether a municipal ordinance goes further than necessary to remedy the evil to be cured, this Court must, in the absence of clear showing to the contrary, accord good faith in the municipality."

Hadacheck v. Los Angeles, 239 U. S. 394.

[2] It will be observed from a consideration of the pleadings in the instant case, as well as the decree of the Supreme Court of the State of Louisiana, that aside from the Federal questions raised by the appellant in its answer, there were other questions presented for decision.

The Supreme Court of the State of Louisiana, as will appear from the opinion and decree of that Court, based its decision not alone upon the fact that the Ordinance requiring the demolition and removal of the viaduct, was a legal and valid exercise of the police power vested in the City of New Orleans and was not violative of the Federal and State Constitutions, but upon other questions which are non-Federal, to-wit: (1) The right of the City, under its charter, to open and keep open and free its streets; (2) That the City had ample police power for the discharge of its functions to enforce all ordinances for the protection of the lives and property for the preservation of the health, and for the promotion of the comfort, convenience and general welfare of its inhabitants; (3) That the viaduct, due to decay, could not be regarded as safe.

We submit, that the non-Federal questions upon which the Supreme Court of the State of Louisiana based its opinion and decree affirming the judgment of the District Court are broad enough to maintain the judgment requiring the removal and demolition of the viaduct.

> "Where the Supreme Court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."
>
> *Browne v. Union Pacific R. Co., 267 U. S. 255; 69 L. Ed. 601.*
>
> *Hammond v. Johnston, 142 U. S., 73; 35 L. Ed. 941.*

"A Federal question is not presented to this court for review, although decided by the state court, if questions of a purely state character were passed upon by that court, which are sufficient to sustain its decree, wholly independent of the Federal question."

Castillo v. Mc Connico, 168 U. S. 674; 42 L. Ed. 622.

"Where the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question."

Rutland Railroad Co. v. Central Vermont Railroad Co., 159 U. S. 630; 40 L. Ed. 285.

"A writ of error to a state court will be dismissed when the decision was based on a local or state question, and it is unnecessary to decide any Federal question."

White v. Leovy, 174 U. S. 91; 43 L. Ed. 907.

"Where a state decision rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

California Powder Works v. Davis, 151 U. S. 389; 38 L. Ed. 207.

"When a decision of a Federal question is rendered unnecessary by the view which the state court properly takes of the rest of the case, within

the scope of the pleadings, the state judgment is not open to review."

Wells v. Crane, 150 U. S. 84; 37 L. Ed. 1007.

"Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question has been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Eustis v. Bolles, 150 U. S. 361; 37 L. Ed. 1111.

"Where a case might properly have been determined upon a ground broad enough to support the judgment without resort to a federal question, this court has no jurisdiction."

Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293; 45 L. Ed. 193.

"To give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been decided without deciding it."

Cook v. Calumet & Chicago Canal & Dock Co., 138 U. S. 635; 34 L. Ed. 1110.

Blount v. Walker, 134 U. S. 607; 33 L. Ed. 1036.

Adams v. Russell, 229 U. S. 353.

"Where the decree of the state court does not rest upon the State Statute in question, but upon independent grounds, it cannot be said that the decision of the state court was based upon the application of the Statute as a valid Act affecting the contract of plaintiffs in error and impairing its obligation."

"Where the Supreme Court of a State decides a federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

Hopkins v. McClure, 133 U. S. 380; 33 L. ed. 661.

"Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent grounds, and it appears that the court did, in fact, base its judgment on such independent ground, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one."

Klinger v. Missouri, 80 U. S. 257; 20 L. Ed. 635; (cited approvingly in *New Orleans Waterworks v. Louisiana Sugar Refining Co., 125 U. S. 18-38; 31 L. Ed. 611).*

"* * * But the answer to this is that when, as here, there can be no pretense that the court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any Federal question, this court accepts the decision, whether right

or wrong. Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., 243 U. S. 157, 164, 61 L. ed. 644, 37 Sup. Ct. Rep. 318 * * *."

Nickel v. Cole, 256 U. S. 222.

We could go on almost indefinitely citing decisions of this Court, holding in line with the decision from which we have quoted above. Our examination of the jurisprudence on this question shows that it has been firmly adhered to for almost a century.

The authorities cited by appellant in their brief (pages 2, 3, 4 and 5) are not relevant to any issue raised by their appeal or by the City's motion to dismiss. We have never contended that this Court has no jurisdiction to determine the constitutionality of a City Ordinance. We contend that this Court is without jurisdiction in this case because the decision of the State Court of last resort has been predicated upon an issue, broad enough upon which to base a definitive judgment without the necessity of determining any Federal constitutional question that has been raised in the pleadings, by way of defense. It is our view and contention that the one question involved in this case is the question, *vel non*, of the right of the City Council to police its streets, and to pass such ordinances as may be necessary for the public safety, and the protection of lives and property of its citizens. If, in the exercise of such power, the Council determines, as a matter of fact, that the viaduct in this case is unsafe and orders its removal under the police power inherent in the Council, and if, after the trial of the issues involved on those particular facts, the Court of last resort of the State of Louisiana determines that the viaduct, as a matter of fact, is

unsafe, then this Court will not, under its well established jurisprudence, inquire into any question of fact so determined by the State Supreme Court. And this, although a Federal question may have been injected by the appellant because it matters not what rights the Company may, or may not have, under the Federal Constitution in connection with the ordinances in question, if the structure used in connection with the operation of its cars under its franchise be in point of fact, a menace to the safety and lives of the people of the City of New Orleans, and if, as a matter of fact, it be an obstruction of the public streets over which the City of New Orleans has unlimited police power. At this point we would again direct this Court's attention to the fact that the Supreme Court of the State of Louisiana has decided that the City of New Orleans has all the police powers that the State itself could exercise, over its streets and over the territorial limits of the City of New Orleans.

Le Blanc v. City of New Orleans, 138 La. 243 (70 So. 212).

State v. City of New Orleans, 151 La. 24 (91 So. 533).

Black v. City, 145 La. 180 (82 So. 81).

We submit, therefore, that the decree of the Supreme Court of the State of Louisiana, affirming the judgment of the District Court, being based upon questions which were non-Federal in their nature, and which in themselves were broad enough to maintain such judgment, this Court is without jurisdiction to review the judgment of the Supreme Court of the State of Louisiana.

(B)

DOES THE STATE COURT DECISION DEPRIVE DEFENDANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW?

Of course, compliance with the ordinance would involve an expenditure of money; but so does compliance with regulations requiring a railroad to keep its roadbed and right of way free from combustible matter; to provide its locomotives with spark arresters; to provide cattle guards or the like. Such regulations, nevertheless, have always been sustained as being constitutional.

We do not believe that it can be seriously contended that the compliance with the ordinance for the removal of the viaduct would interfere with the exercise of the franchise for the operation of the street car line which traverses the viaduct sought to be demolished.

The ordinance requiring the removal and demolition of the viaduct was passed under the police power enjoyed by the City and in the interest of the safety and convenience of the public.

> "And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, in the sense of the 14th Amendment. Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 255; 41 L. Ed. 979, 991; 17 Sup. Ct. Rep. 581; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 462; 49 L. Ed. 831, 835; 25 Sup. Ct. Rep. 471; Chicago B.

& Q. R. Co. v. Illinois, 200 U. S. 561, 591; 50 L. Ed. 596, 608, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175."

Chicago & A. R. Co. v. Tranbarger, 238 U. S. 77; 59 L. Ed. 1211.

"The imposition upon a railroad company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, does not amount to a taking of private property for public use, which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution."

Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 561; 50 L. Ed. 597.

"Neither the contract nor due process of law clause of the Federal Constitution prevents a municipal corporation from promoting the public health, safety, or general welfare by forbidding a railway company, through whose acquiescence a part of its right of way through the city not occupied by its tracks has by long use become the city's principal business street, to shift cars on the four block of such tracks which lie in the heart of the city except during certain specified hours, or to permit cars to stand within those blocks for a longer period than five minutes, and by requiring the tracks to conform to the street grade, and the spaces between the rails to be filled in except at street intersections—even assuming that the railway company has still a complete and unqualified ownership of the strip of land that was originally acquired in fee simple, and, as proprietor, may lawfully exclude the public therefrom."

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 547; 58 L. Ed. 721.

"* * * The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. Sayard v. Denny, 158 U. S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; Castillo v. McConnico, 168 U. S. 674, 683, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229 * * *."

Enterprise Irrig. District v. Farmers Mutual Canal Co., 243 U. S. 166; 61 L. ed. 649.

(C)

IS THERE ANY IMPAIRMENT OF DEFENDANT CONTRACT RIGHTS?

The franchise under which the defendant operates the street car line which traverses the viaduct was granted subject to the right of the City under its police power to control and regulate the same. Further than this the viaduct, as it presently exists, interferes with the free use of the street by the inhabitants of the City of New Orleans and more particularly is a hazard and menace to automobile traffic, by reason of the earthen embankment spreading into the street, causing a narrowing of the roadway on one side of Franklin Avenue from its normal width of 28 feet to 18 feet. Whatever right the defendant has is subject at all times to regulation by the City.

The City of New Orleans could not, under its charter, grant to the defendant an absolute right to the use of

the streets, for the reason that municipalities cannot barter away the rights which the inhabitants of the community enjoy and whatever rights the defendant may enjoy and exercise under its franchise is subject at all times to the regulatory power of the municipal authorities. Under the law of *Louisiana Civil Code, Article 454*, it is said:

> "Things which are for the common use of a city or other places, as streets and public squares are likewise public things."
>
> *Civil Code of Louisiana, Art. 454.*

> "Every reason of public policy requires that grants in the subservance of streets shall be held subject to reasonable regulations as the public health and safety may require. Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking of property without due compensation."
>
> *New Orleans Gas Light Company v. Drainage Commission, 197 U. S. 453; 25 S. C. R. 471; 49 L. Ed. 831.*

> "But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the state for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property.
>
> "It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or

general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 58 L. Ed. 721, 726, 34 Sup. Ct. Rep. 364, and cases cited. * * * "

" * * * The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the exercise of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations."

New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 460; 49 L. Ed. 834.

N. O. Gaslight Co. v. Louisiana Light, etc., Mfg. Co., 115 U. S. 650; 29 L. Ed. 517.

"Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State within legislative control, in the exercise of which the Legislature is vested with a large discretion beyond the reach of judicial inquiry, if it is exercised *bona fide* for the protection of the public."

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677; 67 Sup. Ct. Rep. 714.

"The police power of a State is not confined to the suppression of what is offensive, disorderly or insanitary, but embraces regulations designed to

promote the public convenience or the general prosperity."

Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. Rep. 289.

As long ago as 1829, this Court recognized that a State, under its general police power, has authority to do any act not unconstitutional to enhance the value of property and to improve the health of its inhabitants. Thus, in *Willison, et al., v. Black Bird Creek Marsh Co., 6 Pet. 251*, it said:

> "The act of assembly by which plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states."

(D)

IS THERE A DENIAL TO DEFENDANT OF THE EQUAL PROTECTION OF THE LAWS?

We do not feel for a moment that defendant is at all serious in its contention, that the enactment of the ordinance requiring the removal of the viaduct, is a denial to it of the equal protection of the laws, and this is indicated by the fact that defendant in its "Statement of Points To Be Relied Upon" (Record, p 169) does not include this question as one of the points relied upon.

(E)

THE MERITS OF THE CASE.

We will take up and discuss in their order the defenses relied upon by the New Orleans Public Service Inc., in the order in which they have been made, and we believe that we can show that all of the defenses thus made are refuted by the record and the facts of the case.

1st: That its predecessor was required by the City Council to construct said viaduct for public safety.

To refute this defense it will only be necessary to refer your Honors to the terms and provisions of *Ordinance No. 6445, N. C. S.*, which says:

Ordinance No. 6445, New Council Series.

"Whereas the New Orleans Terminal Company has objected to the New Orleans Railway and Light Company crossing its tracks at grade on Franklin Avenue, at the intersection of Florida Walk, in connection with the franchise granted by the said New Orleans Railway and Light Company by Ordinance No. 6032, New Council Series, and

Whereas the general public interest will be best subserved by the said tracks not crossing at grade, but that the said tracks cross the tracks of the New Orleans Terminal Company on a viaduct; and

Whereas the New Orleans Railway and Light Company is satisfied to build such viaduct; therefore

Be it Ordained by the Council of the City of New Orleans, that the City Engineer be and he is hereby authorized to approve plans for a Viaduct

to be constructed by the New Orleans Railway and Light Company, approximately on the center line of Franklin Avenue, at, and in the vicinity of the Florida Walk intersection, the said Viaduct to embrace earthen embankment approaches of such height and width as will not exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways on said avenue."

Appellant's counsel (brief, page 37) states that the City's petition alleges "that Ordinance 6445, New Council Series, 'directed and required the New Orleans Railway & Light Company to construct.'"

While it is true that the petition makes this statement, it is equally true that Ordinance 6445, New Council Series, is annexed to and forms part of the petition, and under the jurisprudence of the Supreme Court of the State of Louisiana, any variations between allegations in the petition and documents annexed to and forming part thereof, are controlled by the documents themselves. It is obvious that the statement that the said ordinance directed and required the construction of the viaduct, was an error which escaped attention at the time the petition was filed.

We respectfully submit that the authorities supporting the statement of law above made, will be found in the jurisprudence of Louisiana as exemplified by the following cases:

"Documents annexed to a petition and made a part thereof control the averments of the petition founded upon them."

Lewy v. Wilkinson, 135 La. 105 (64 Sou. 1003).

Teutonia Bank v. Wagner, 33 La. An. 732.
State Ex Rel. Saint v. Louisiana Western R. Co., 18 Fed. (2nd) 645.

It will thus be observed for the very terms of the Ordinance that the City Council did not require the predecessor of defendant to construct said viaduct for any reason whatsoever but merely "permitted" them so to do.

2nd: That it was constructed at a cost of $58,000.00.

Even admitting for the sake of argument that the construction of the viaduct did cost $58,000.00, that does not prevent the City of New Orleans under its police power to require its removal on the ground that it is dangerous and a menace to life, and upon the further ground that it interferes with the free use of the streets.

Further, the figure given is the original cost of construction of the viaduct and no depreciation whatever has been taken into consideration; consequently, if depreciation was figured over the 19 years that the viaduct has been in existence the viaduct would be in the category of a liability rather than an asset valued at $58,000.00.

3rd: That it has been operated with due regard to safety.

It would take too much space to quote the abstracts from the testimony showing that the structure is anything but safe. The record reeks with incidents of the dangerous and hazardous condition of the viaduct. We quote below two excerpts from the testimony, and if there were no other evidence in the record but these two things, they alone, we

submit, would be sufficient reason for the removal of the structure because of its dangerous condition:

From the testimony of David W. Godat, connected with the City Engineer's Office, a witness for plaintiff:

Q. What about the foundation?

A. The foundation on the riverside, in connection with the foundation on the riverside, the earth has subsided away from the base of the pier, exposing at least two and possibly three rows of the piling which support it. The front row of piling has twelve piles and of those twelve piles eight of them—five of them were rotted to such a condition you could almost shake them apart with an ordinary wooden stick. There was, however, some small part left in the pile, but not sufficient to carry any real load at all. Now, we were unable to get into the second and third row of piling, but I would feel that the same conditions were present. In other words, the pile was exposed to the elements and to the puddling action of any rain water which might seep under and not drain away. (Record, p. 26).

Q. Did you in 1926 after your inspection consider that while you found these defects that the trestle was safe for the operation of cars there over?

A. There were two inspections made in 1926, one on October 31 and one on November 8. The first inspection was made by myself, Mr. Wyler and Mr. Cracroft. The purpose of the inspection, the limited time in which to make the inspection did not allow us a sufficient time to, oh, go into it as much in detail as we wanted, and for that reason the findings were referred to Mr. Vallas with the request that the street cars be stopped until such time as a joint investigation could be made in connection with the engineers of the Public Service, which request was granted, and a joint inspection

made by myself, Mr. Guillot and a party of men under the Public Service. The findings of the November 8th inspection, or the purpose of that inspection, was to ascertain how much danger existed in the piles which were called dangerous on the first inspection. Now, after the inspection I still—I wrote a second report in which the viaduct was considered as dangerous. In Mr. Vallas' absence the report was sent directly to Commissioner Hall.

Q. Now, does that report that the viaduct was dangerous, or did those findings consider that the whole viaduct was dangerous, I mean, now, for the purpose that you had in mind in stopping the cars?

A. No, sir, the findings, were such that would allow the street cars to operate. Wait a minute. I would like to think a minute—Yes, the inspection was such as to consider the viaduct safe temporarily for the operation of cars, and, as I remember it, I requested that men be posted at Bent 28, on the Gentilly end of the viaduct to observe those—that bent under the operation of the cars, because it was that bent more than any other which caused the condemnation of the viaduct itself. (Record, pp. 29-30).

From the testimony of I. C. Moll, an engineer in the employ of defendant, and called as a witness for defendant, we have the following:

"Q. Mr. Moll, did you examine the pilings under these pillars?

"A. I examined the pilings that could be seen from the outside.

"Q. What did you find?

"A. **I found them to be decayed,** but not to the extent that they are not able to carry their load. They are still able to carry all the load that they have to carry. (Record, p. 126).

"Q. How many did you see?
"A. Twelve.

"Q. Of those twelve that you saw, how many showed deterioration or rot?
"A. **All of them.**" (Record, p. 133).

In support of the correctness of the decisions of both the Civil District Court and the Supreme Court of Louisiana as to the fact that the viaduct was unsafe and therefore should be removed, we call the attention of this Court to the printed Transcript of the Record at page 153. Mr. Moll, a witness for the appellant, was asked:

Q. "Well were outside engineers employed?
A. "Yes sir.

Q. "Who were they?
A. "Professor Derickson was employed in December. (R. Fol. 205).

Q. "Professor Derickson is a recognized Engineer?
A. "He is, and since that time, Mr. J. Frank Kohlman made an inspection."

The name of Mr. Kohlman is incorrectly spelled. It should be "Coleman". This correction is made merely to identify the gentleman who is now President of the American Society of Engineers, and who has held other high offices of honor in various engineering societies. He is recognized as one of the foremost engineers of the Country. Professor Derickson is not only a recognized engineer, but is the Professor of Engineering at Tulane Uni-

versity at New Orleans, and is one of the outstanding men in his profession.

Neither of these gentlemen was placed on the witness stand by the appellants who had employed them for the purpose of making an examination and to report thereon, nor was any explanation given for their failure to testify.

It is elementary law, we believe, that the Court must assume that the report that these two eminent engineers made was unfavorable to the Company and supported the City's contention that, as a matter of fact, the viaduct was unsafe.

4th: That it is adequate and sufficient for the transportation of the users of the line.

There is considerable testimony on this point, the greater portion of which shows that because of the single track which crosses the viaduct there are numerous delays. This testimony shows that the viaduct does not provide sufficient and adequate transportation for the users of the line. It must be remembered that this viaduct was erected 19 years ago; as we say in our petition, and as we have shown by testimony, that section of the City was very sparsely inhabited. At the time of the construction of the viaduct it was sufficient for the needs of the people of the section of the City served by the line traversing the viaduct, but now that nineteen years have passed, the viaduct is not sufficient for the line that traverses it in order to give to the users adequate transportation.

5th: That there is no need to require the destruction of the viaduct, which would involve an expenditure of $135,000.00.

The City has shown that there is good and sufficient need for the demolition and removal of the viaduct, to-wit:

1st: That the viaduct as constructed and presently existing **"exceeds the neutral ground space on Franklin Avenue"** and it obstructs the roadway on Franklin Avenue by reducing the width on the lower side of Franklin Avenue from 28 feet to 18 feet in width; and this in itself constitutes a hazard to automobile traffic.

2nd: As an engineering fact, the viaduct has become so dilapidated and the supports, (particularly the piling under the concrete column), are so decayed as to render it unsafe and is therefore dangerous to life and limb and a menace to the safety of the users thereof and generally the public of the City of New Orleans.

3rd: That the viaduct, by reason of its very existence, has closed certain streets which intersect Franklin Avenue and destroys their free use.

To our mind, all of these things, or any one of them alone taken into consideration, show sufficient reason and need for the demolition of the Franklin Avenue Viaduct; and show a legitimate exercise of the police power vested in the City of New Orleans to require its removal.

Appellants urge in their brief that the expenditure of $58,000 for the construction of the viaduct and a necessary expected expenditure of $135,000 more to demolish

the same and construct their tracks at grade, is in effect, the taking of property without due process of law. The answer to this is that in the year 1922, after the New Orleans Public Service, Inc., had acquired all of the physical properties, rights, etc., of the New Orleans Railway & Light Company in the receivership sale conducted by the Federal District Court for the Eastern District of Louisiana, the New Orleans Public Service, Inc., as the successor of the New Orleans Railway & Light Company, surrendered all of its franchises previously held by the New Orleans Railway & Light Company, including the one under which the appellant operates a street car line over the viaduct involved in this case, and obtained from the City of New Orleans, under the provisions of Act #94 of 1921, an indeterminate permit to continue said street car operation over said viaduct. Under this indeterminate permit the City of New Orleans has absolute power, supervision and control over the operation of the street railways system in the City of New Orleans, and particularly with regard to traffic routes, etc. Under the terms of the Ordinance which was adopted by the Commission Council of the City of New Orleans granting said indeterminate permit, it was specially provided that all capital expenditures made by the New Orleans Public Service, Inc., for improvements, extensions and betterments in its street railway system, should go into the Rate Base of the Corporation, on which it is permitted to earn a lawful rate of return not exceeding 7½ per cent. Hence, it is manifest that any expenditure made for the construction of the viaduct, or for its demolition and removal, cannot be deemed to be a taking of property without due process of law.

6th: That there was no justification for the passage of Ordinance No. 9375, C. C. S.—which requires the removal of the viaduct.

The Commission Council of the City of New Orleans, after considering the facts regarding the structure relative to its: (1) Exceeding the neutral ground width; (2) Its dilapidated and dangerous condition; (3) The closing of certain streets intersecting Franklin Avenue found as a fact: That there were true and acting under their findings passed the Ordinance No. 9375, C. C. S., and that alone was sufficient justification for the passage of the Ordinance for the reason that, as has already been said in this brief, the power to control the operation of street railways, and to regulate them in the interest of public safety; the power to keep open and free from obstructing its streets—are all powers possessed by the City of New Orleans under its charter and a valid exercise of that power.

It is urged by appellant that there would really be no necessity for requiring the removal of the viaduct from the neutral ground, for the purpose of widening Franklin Avenue at that point, if the City had not reduced the width of the street by widening the sidewalk. We submit that it is entirely within the discretionary powers of the Council to determine whether or not the sidewalks of the City should be widened or not, and if, in the exercise of said discretionary power, it is deemed advisable so to do, then it must necessarily follow that the City can avail itself of the right to use the neutral ground portion of the street for the widening of the roadway. In other words, the City is not required to retain the narrow sidewalks in order not to inconvenience the New Orleans Public Service, Inc., in

its illegal use of the neutral ground area in excess of that originally permitted by the ordinance granting authority to construct the viaduct. This principle of law has been definitely decided. The general principle is well established that the legislative power of a city to control and improve the streets is unquestioned, and such power, when duly exercised by ordinances, will override any licenses previously given by which the control of a certain street has been surrendered to an individual or corporation. To this effect are the cases of:

Wabash R. Co. v. Defiance, 167 U. S. 97;
New York v. Squire, 145 U. S. 175;
Missouri v. Murphy, 170 U. S. 78;

and again, we insist that there is nothing in the franchise of the appellant that gives it control over any street, the most that it ever had under the franchise being the right to use the street for purposes of laying its tracks and operating its cars, and the ordinance involved in this litigation does not attempt to deprive the appellant of the right to continue the operation of its cars over that line of track.

The City of New Orleans, as previously stated in this brief, is vested with the exercise of absolute police power and supervision over the local public utilities, and its streets and public places, and over all matters affected by and subject to the police power of the State. This has been judicially determined by the Supreme Court of Louisiana in the following cases:

State v. City, 151 La. 24 (91 Sou. 533).
Le Blanc v. City, 138 La. Rep. 243 (70 Sou. 212).
Black v. City, 145 La. 180 (82 Sou. 81).

7th: That it is not a legitimate exercise of the police power of the City.

As we have already said, we do not believe the defendant is at all serious in its contention and we have fully discussed this point.

(F)

The case of the *Grand Trunk Western Railway Company v. South Bend, 277 U. S. 544*, cited by appellant, at pages 28 and 34 of their brief, has no application. In that case it was sought to compel the removal of one of two tracks for which a franchise had been granted. In this case, no attempt is made by the City to compel the removal of any track, or the discontinuance of any service over a designated route. It is merely an effort on the part of the City to compel the removal of a dangerous and unsafe structure over which the Company operates a line of track to the peril of the passengers.

The case of *Owensboro v. Cumberland Telephone Company, 230 U. S. 58*, (appellant's brief, pages 29-30), is likewise not applicable. An attempt was there made to compel the removal of telephone poles and wires, or the charging of a fixed sum for the maintenance thereof which would have had the effect of either removing the poles or seriously affecting the original franchise granted. There is absolutely no analogy between the facts of that case and the facts in the instant case.

Counsel for appellant state in their brief (page 29):

"In the case at Bar, the City is seeking to destroy part of the street car franchise by com-

pelling the removal of the Franklin Avenue Viaduct. The police power of a municipality cannot be used to revoke or repeal an ordinance under which property rights have been granted as in this case, and thus destroy such property rights."

It is well to remember that the franchises under which the Company operates its cars down Franklin Avenue do not grant them the right to operate over a viaduct, but merely the right to use the street, subject to the police power inherent in the City. The ordinance requiring the removal of the viaduct does not revoke or repeal in any manner, nor does not, in any manner, affect any franchise right to operate a street car line down Franklin Avenue. It merely requires the Company to operate the cars over a track constructed in a safe and proper manner.

(G)

There appears at several places in appellant's brief, particularly on pages 13 and 42, the insinuation, if not the direct charge, that the City Council of New Orleans ordered the removal of the viaduct in order to enhance property values, and for political purposes or motives. The insinuation is quite broad that the Council's motive was to court the favor of the inhabitants in that section who wanted the viaduct removed, rather than because the structure was unsafe. The answer to this is obvious. Both the Judge of the Trial Court and the unanimous decision of the Supreme Court held that as a matter of fact the evidence proved the structure to be unsafe.

We feel confident that the record does not disclose any evidence which justifies appellant's Counsel in making the charge or insinuation above referred to, which appears in their brief.

Furthermore, the question of motive is not before this Court. We believe it elementary that an ordinance which is passed by the Commission Council in the exercise of its police power, if not otherwise unconstitutional, cannot be set aside because of an improper motive. Neither could an ordinance adopted by the Council in violation of constitutional rights be sustained for the reason that it was adopted because of a praise-worthy motive on the part of the Council.

CONCLUSION.

In conclusion, we submit that the appeal of the defendant should be dismissed, since the decree of the Supreme Court of the State of Louisiana, which affirms the judgment of the District Court, is based on questions which are non-Federal and broad enough to support the decree and judgment.

In the alternative, we submit, that the City of New Orleans possesses power under its charter to control and regulate the operation of street railways; to open and keep open its streets and to regulate and control the use thereof; that in order to carry out these purposes it is authorized to pass and enforce all necessary ordinances; that *Ordinance No. 9375, C. C. S.*, is a legal and valid exer-

cise of the police power vested in the City of New Orleans; that the passage of the said Ordinance was in the interest of the public safety; that the City of New Orleans, through its Commission Council and the Supreme Court of the State of Louisiana, are the sole judges of the safety of the viaduct structure and of what is needful and proper for the safety of the inhabitants of the City of New Orleans; that, therefore, the decree of the Supreme Court of the State of Louisiana is correct, and should be affirmed.

Respectfully submitted,

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